APPEAL NO. 051587
FILED AUGUST 22, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on February 14, 2005, with the record closing on June 24, 2005. The hearing officer resolved the disputed issues by deciding that the respondent (claimant) has a 20% impairment rating (IR) and that the claimant is entitled to supplemental income benefits (SIBs) for the first, second, and third quarters. The appellant (carrier) appealed, disputing the IR and the SIBs entitlement determinations. The claimant responded, urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable low back injury on _____, and that he reached maximum medical improvement (MMI) on February 26, 2003. The hearing officer determined after the CCH, that the record be held open for the appointment of a second designated doctor. Neither party objected to the appointment of a second designated doctor. (Dr. B) was appointed as the second designated doctor and examined the claimant on March 22, 2005. Dr. B initially certified that the claimant reached MMI on August 3, 2003, with a 20% IR. The hearing officer sent a letter of clarification to Dr. B, informing him that the parties agreed that the MMI date is February 26, 2003, and impairment should be assessed as of that date. Dr. B responded to the letter of clarification and corrected the MMI date and assessed an IR of 20%. The claimant requests in his response that the MMI date be changed to August 3, 2003. We note that although the claimant's response was timely as a response, it was not timely as an appeal. Further, Section 410.166 provides that an oral stipulation or agreement of the parties that is preserved in the record is final and binding. The claimant also requested that the carrier be ordered to pay SIBs for the fourth, fifth, and sixth quarters. Section 410.203(a)(1) provides that an Appeals Panel shall consider the record developed at the CCH. The entitlement to SIBs for the fourth, fifth, and sixth quarters were not before the hearing officer and therefore, were not part of the record available for review.

The carrier contends in its appeal that Dr. B did not review the complete medical records or the preoperative lumbar x-ray film in assessing impairment; that Dr. B bases the 20% IR on medical records and the claimant's condition after MMI; that Dr. B incorrectly automatically applied Texas Workers' Compensation Commission (Commission) Advisory 2003-10, signed July 22, 2003; and that the great weight and preponderance of the credible medical evidence is against the 20% IR. In evidence as a hearing officer exhibit are Dispute Resolution Information System notes which reflect that a representative of Dr. B's office acknowledged receiving x-rays and records from the carrier but noted that the x-rays received were not flexion/extension x-rays. Dr. B

assessed the claimant's IR as of the stipulated MMI date, placing the claimant in Diagnosis-Related Estimate (DRE) Lumbosacral Category IV. It is clear from his correspondence, that Dr. B considered Advisory 2003-10, however, we do not agree with the carrier's allegation that Dr. B "incorrectly automatically applied [the Advisory]." In Texas Workers' Compensation Commission Appeal No. 042108-s, decided October 20, 2004, we held that Commission Advisories 2003-10 and 2003-10B, signed February 24, 2004, do not require the assignment of an IR based on DRE Category IV if there is a multilevel spinal fusion, but that the Commission advisories must be considered as part of the certifying doctor's process in determining the appropriate IR.

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary, and that, if the great weight of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors. Rule 130.6(i) provides that the designated doctor's response to a Commission request for clarification is considered to have presumptive weight as it is part of the doctor's opinion. The hearing officer found that the May 9, 2005, amended certification of the designated doctor, Dr. B, is not contrary to the great weight of the other medical evidence. Whether the great weight of the other medical evidence was contrary to the opinion of the designated doctor was a factual question for the hearing officer to resolve. When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). In this case, we are satisfied that the hearing officer's IR determination is sufficiently supported by the evidence.

The hearing officer found that: (1) based on a 20% IR, the first SIBs quarter was September 27 through December 26, 2004, and the qualifying period for this quarter was from June 15 through September 13, 2004; (2) that the second SIBs quarter was December 27, 2004, through March 27, 2005, and the qualifying period for this quarter was from September 14 through December 13, 2004; and (3) that the third SIBs quarter was March 28 through June 26, 2005, and the qualifying period for this quarter was from December 14, 2004, through March 14, 2005. The carrier appeals these findings of fact and the claimant also notes in his response that the dates the hearing officer found for the SIBs quarters in dispute were incorrect. It appears that although the hearing officer based his SIBs date calculations on a 20% IR, he used an incorrect MMI date in his calculations. The correct dates for the SIBs quarters in dispute using the MMI date of February 26, 2003, and a 20% IR are as follows: (1) the first SIBs quarter was April 22 through July 21, 2004, and the qualifying period for this quarter was January 9 through April 8, 2004; (2) the second SIBs quarter was from July 22 through October 20, 2004, and the qualifying period for this quarter was from April 9 through July 8, 2004; and (3) the third SIBs quarter was from October 21, 2004, through January 19, 2005, and the qualifying period for this quarter was July 9 through October 7, 2004. Given the substantial differences in the dates of the applicable SIBs quarters and qualifying periods, we remand this case back to the hearing officer to examine the

evidence and make a determination regarding entitlement to SIBs based on the correct dates. The hearing officer at his discretion, may receive additional evidence from the parties on the issues of entitlement to SIBs for the first, second, and third quarters.

We affirm the hearing officer's determination that the claimant has a 20% IR and reverse the determinations that the claimant is entitled to SIBs for the first, second, and third quarters and remand for the hearing officer to take action consistent with this decision.

The true corporate name of the insurance carrier is **TWIN CITY FIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEMS
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Robert W. Potts
Appeals Judge